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No. 95-53

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

COLUMBIA GULF TRANSMISSION COMPANY,
Petitioner,

versus

RALPH SLAUGHTER, SECRETARY OF THE DEPARTMENT OF REVENUE AND TAXATION, STATE OF LOUISIANA,
Respondent.

On Petition for A Writ Of Certiorari To The Supreme Court of Louisiana

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN GAS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE AMERICAN GAS ASSOCIATION

Pursuant to Rules 30.4 and 37.2[1], the American Gas Association (hereafter, A.G.A. or the Association) respectfully moves for an enlargement of the time within which to file a brief *amicus curiae,* and for leave to file the attached brief *amicus curiae* in support of Columbia Gulf Transmission Co.'s (Columbia) petition for writ of certiorari. Counsel for Petitioner and Respondent consent to the filing of this brief.

A.G.A.'s Position.

Rule 37.2 requires that briefs *amicus curiae* be filed "only if submitted within the time allowed for filing a brief in opposition to the petition for a writ of certiorari or for filing a motion

[1]Sup. Ct. R. 30.4, 37.2 (1995)

to dismiss or affirm." The petition for certiorari was filed by Columbia on July 5, 1995. A.G.A.'s *amicus* brief was due on August 4, 1995. A.G.A. represents to the Court that it was not a participant in the proceedings below and was not informed of the pendency of this petition until following the time the *amicus* brief was due. A.G.A. believes, however, that A.G.A.'s perspective on the primary issue in this matter would be of benefit to the Court. A.G.A., as a national not-for-profit trade association, has more than 275 member companies consisting of distribution companies, interstate pipelines, marketing companies and gathering companies involved in the production, sale, transportation and distribution of natural gas throughout the United States, Canada and Mexico. A.G.A.'s member companies account for more than 90% of the gas delivered in the United States and provide service to nearly 58 million residential, industrial and commercial customers. A.G.A's member companies, including the petitioner, Columbia, will be directly affected by the outcome of this proceeding.

This matter involves the imposition of a use tax on natural gas used as fuel in connection with the interstate transportation of natural gas. The state of Louisiana seeks to tax the use of that fuel even though its purpose is to provide energy necessary to run compressors that assist in moving natural gas transported by Columbia solely in interstate commerce. The imposition of the tax is a burden on interstate commerce in contravention of the Commerce Clause of the Constitution.[2]

A.G.A.'s Reasons for its Brief *Amicus Curiae*.

A.G.A. seeks to file the attached brief for several reasons: 1) state taxation of this fuel use is inappropriate under the Commerce Clause; 2) the Supreme Court of Louisiana inappropriately discounted this Court's prior decisions on matters

[2]U.S.Const. art.I, §8, cl. 3

of this nature, creating the wrong impression that this Court's view of the Commerce Clause had been substantially changed; 3) the several states of Wisconsin, Tennessee, Arkansas, Mississippi, Utah, and Louisiana have reached differing conclusions regarding the propriety of similar taxes and the resolution of such differences is important to industries doing business in these states, to the national natural gas industry as a whole, and to A.G.A.'s membership located in all 50 states; and 4) the emerging national natural gas marketplace will be adversely affected if Louisiana and other states are allowed to impose such use taxes.

A.G.A.'s view of the national natural gas marketplace is important in this Court's consideration of this petition for certiorari. This tax is contrary to the express policy of the United States Congress. Congress, in passing the Natural Gas Policy Act of 1978[3] and the Wellhead Decontrol Act of 1989[4] created the legislative framework for a substantially deregulated national natural gas marketplace. The Federal Energy Regulatory Commission (FERC), in implementing that legislative mandate, issued a number of orders that brought life and substance to that legislative mandate. Among those orders were Order No. 436,[5] Order No. 500,[6] and Order

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[3]Natural Gas Policy Act of 1978, 15 U.S.C. §3301, *et seq.* (1982).

[4]Pub. L. No. 101-60, 103 Stat. 157 (1989) (*codified at various sections of 15 U.S.C. §3301 (1982)*).

[5]*Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III FERC Stats. & Reg. [Reg. Preambles] ¶30,665 (1985), *vacated and remanded, Associated Gas Distributors, v. FERC*, 824 F.2d 981 (D.C.Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

[6]*Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III FERC Stats. & Reg. [Reg. Preambles] ¶30,761 (1987), *remanded, American Gas Association v. FERC*, 888 F.2d 136 (D.C.Cir. 1989), *readopted*, Order No. 500-H, III FERC Stats. & Reg. [Reg. Preambles] ¶30,867 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, III FERC Stats & Reg. [Reg. Preambles] ¶30,880 (1990) *aff'd in part and remanded in part, American Gas Association, v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).

No. 636.[7] Those orders, together with the Congressional mandate, transformed the natural gas industry from a highly regulated and structured industry to one marked by free and open competition for gas supplies and transportation services. Critical to the development of that more open and free marketplace are the interstate pipelines. A.G.A. believes that Louisiana's tax on compressor fuel use is anathema to the open marketplace mandated by Congress. Interstate pipelines are the only "instrumentalities of interstate commerce" through which the interstate commerce in natural gas can be conducted.

For the foregoing reasons, the Association, on behalf of its members, respectfully requests the Court grant this motion to enlarge the time to file the attached brief, and for leave to file the brief *amicus curiae* so that the views in the attached brief may be considered by this Court.

Respectfully submitted,

AMERICAN GAS ASSOCIATION

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[7] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, III FERC Stats. & Regs. [Reg. Preambles] ¶30,939 (1992), (Order No. 636), *order on reh'g*, III FERC Stats. & Regs. [Reg. Preambles] ¶30,950 (1992) (Order No. 636-A), *order on reh'g*,61 FERC ¶61,272 (Order No. 636-B).

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BRIEF *AMICUS CURIAE* OF THE AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONER

The American Gas Association (A.G.A. or the Association) submits this brief *amicus curiae* in support of the petitioner, Columbia Gulf Transmission Co. (Columbia).

INTEREST OF THE *AMICUS CURIAE*

A.G.A. is a national, not-for-profit trade association with more than 275 member companies engaged in the business of producing, gathering, transporting and distributing natural gas to more than 58,000,000 residential, industrial and commercial customers throughout the United States, Canada and Mexico. A.G.A.'s member companies account for more than 90% of all the natural gas delivered in the United States.

The question presented in this case is important to A.G.A.'s member companies. The issue in this proceeding is whether the state of Louisiana may impose a use tax on fuel used to operate compressors that provide the energy to move natural gas through interstate commerce. A.G.A.'s member companies, including pipelines, distribution companies and marketing companies believe that the tax sought to be imposed is a direct burden on interstate commerce. This Court has previously found that such a direct burden violates the Commerce Clause.[1] Congress and the FERC have endeavored over the last decade to create the framework of a national natural gas marketplace. The key ingredient in the development of that national market is the interstate pipeline network. It is only through that network that the interstate commerce in natural gas can reasonably be conducted. Because A.G.A.'s member companies either are interstate pipelines or customers of interstate pipelines that receive some form of interstate service, either directly or indirectly, A.G.A.'s members have an interest in this proceeding. Because A.G.A.'s member companies may pay the tax imposed by Louisiana, or those imposed in other states, A.G.A. files this *amicus* brief to urge the Court to issue its writ of certiorari to consider this matter.

SUMMARY OF ARGUMENT

THE STATE OF LOUISIANA ERRED IN DECLARING THAT THIS COURT'S DECISION IN *HELSON V. COMMONWEALTH OF KENTUCKY* HAS BEEN SUPERSEDED.

The Supreme Court of Louisiana erred in two respects in reaching its decision in this matter.[2] First, Louisiana incorrectly ignored this Court's decision in *Helson v. Common-*

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[1]U.S.Const. art.I, §8, cl.3.

[2]*Columbia Gulf Transmission Co. v. Broussard*, 653 So. 2d 522 (La.S.Ct. 1995).

wealth of Kentucky, 279 U.S. 245 (1929) by declaring that it had been "superseded"[3] by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Louisiana offers no support for this assertion. A proper reading of this Court's decisions in *Helson* and *Complete Auto* shows that *Helson* remains an important element of this Court's consideration of the Commerce Clause. Further, a proper reading of those cases in the context of today's national natural gas market will establish that Louisiana's use tax on compressor fuel directly burdens interstate commerce. Interstate pipelines are the only means by which the national market in natural gas can be conducted. The fuel used to propel that natural gas on its interstate journey is an "instrumentality in interstate commerce".[4] As such, its use should not be subject to Louisiana's use tax. The Commerce Clause[5] restricts the rights of several states to impose taxes on interstate commerce.

THE STATE OF LOUISIANA'S SOLE RELIANCE ON THIS COURT'S DECISION IN *COMPLETE AUTO TRANSIT, INC. V. BRADY* IS NOT APPROPRIATE IN LIGHT OF THE EMERGENCE OF A NATIONAL NATURAL GAS MARKETPLACE.

Secondly, Louisiana's mechanical recitation of the elements that this Court considered in *Complete Auto* focused incorrectly on Columbia's nexus with the state of Louisiana and ignored the essential fact that the compressor fuel use was interstate in character. Many interstate activities protected by the Commerce Clause have some element that begins and ends within a given state. A proper analysis of the activity taxed establishes that such activity is fundamental to interstate commerce,

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[3] *Id.*, at 524.

[4] *Helson & Randolph v. Kentucky*, 279 U.S. 245, 252.

[5] U.S. Const., *Supra*, note 1.

is in fact solely interstate in character, and as such should not be subject to the state tax.

Over the last decade, Congress and the Federal Energy Regulatory Commission (FERC) have endeavored to transform the natural gas marketplace from one characterized by legislative and administrative control and restrictions to one that is national in scope. Congress and the FERC have been largely successful in transforming the market into one where gas produced off-shore of Louisiana or in any other gas producing state can be purchased by anyone willing to pay the price and have that gas transported to literally any state on the continent. The marketplace for natural gas is the interstate pipelines' system. It is only through interstate pipelines that the nation's interstate commerce in natural gas can be conducted. In that context, the tax imposed by Louisiana is a direct burden on interstate commerce and violates the Commerce Clause.

The restrictions imposed on the states by the Constitutional framers should be given weight in this context and Louisiana's tax on compressor fuel use should be judged by this Court to be a burden on interstate commerce contrary to the limitations of the Commerce Clause. This Court should grant Columbia's petition for certiorari.

ARGUMENT

I. THIS COURT'S *HELSON* DECISION HAS NOT BEEN "SUPERSEDED" BY *COMPLETE AUTO TRANSPORT.*

Louisiana's fundamental position is that this Court's decision in *Helson* has been superseded by *Complete Auto Transit*. The Association believes that this position is in error. Since this position is a primary element of Louisiana's decision, this

Court should grant certiorari to review Louisiana's application and interpretation of this Court's prior decisions.

As this Court has noted on numerous occasions, the line drawing exercise to distinguish between permissible state action and conduct by the states that is prohibited by the Commerce Clause is a difficult process.[6] In *Helson*, this Court struck down a state use tax on fuel consumed by a ferry boat because "A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce."[7]

The Court below dismisses the import of *Helson* by summarily concluding that this Court "superseded" its decision in that case with its decision in *Complete Auto Transit*. Louisiana then proceeds to attempt to apply the elements of the test established by this Court in *Complete Auto Transit*. The Association believes that Louisiana's unsupported assertion is in error. A more appropriate reading of the *Helson* and *Complete Auto Transit* decisions would find that *Helson* remains an important part of this Court's consideration of the Commerce Clause. Further, in light of the marketplace that exists today in the natural gas industry, *Helson* is, and should continue to remain, relevant and applicable.

Helson establishes that Kentucky's use tax on the consumption of fuel within that state was a direct tax on an instrumentality of interstate commerce. The fuel could not be separated from the engine or from the ferry boat itself. In *United Airlines v. Mahin*[8] this Court was called upon to consider an Illinois tax on the removal of fuel from storage. The Court upheld

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[6] "We must concede that for a long time this area of state tax law has been cloudy and complicated, primarily because the varied nature of interstate activities makes line drawing difficult." *United Airlines v. Mahin*, 410 U.S. 623, 629 (1973).

[7] 279 U.S. 245, 252.

[8] 410 U.S. 623 (1973).

the tax (but remanded the decision for other reasons). In so doing, however, the Court stated:

> "The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading, as in *Edelman* and *Nashville*, continues to serve rational purposes. Retaining the line at this point minimizes the danger of double taxation and yet provides a source of revenue having a relation to the event taxed. Double taxation is minimized because the fuel cannot be taxed by States through which it is transported, under *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) nor by the State in which it is merely consumed, under *Helson*."[9]

In *Complete Auto Transit*, this Court did not seek to "supersede" or otherwise disturb the principle that a tax on the fuel of an instrumentality of interstate commerce is impermissible. What this Court expressly did in *Complete Auto Transit* was to overturn another decision, *Spector Motor Service v. O'Connor*.[10] In *Spector* and the cases following, the Court engaged in an attempt to draw the line between taxes that were imposed by states on the "privilege of doing interstate business" which were impermissible, and those that reached appropriate taxable events, but measured the amount of tax using the revenues derived from the business' intra- and interstate activities. While each attempted tax had the same economic effect on the company taxed, the *Spector* rule simply created draftsmanship problems for states and companies subject to the tax. In overruling the *Spector* decision, this Court noted:

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[9]410 U.S. 623, 629.
[10]340 U.S. 602 (1951).

> There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on the formalism merely obscures the question *whether the tax produces a forbidden effect. Simply put, the Spector rule does not address the problems with which the Commerce Clause is concerned* (emphasis added).[11]

Complete Auto Transit should not be read as the sole test to be utilized in examining the propriety of all state taxes on activities in interstate commerce. Rather, *Complete Auto Transit* should be read as this Court intended:

> Accordingly, we now reject the rule of *Spector Motor Service, Inc. v. O'Connor,* that a state tax on the 'privilege of doing business' is per se unconstitutional when it is applied to interstate commerce, and that case is overruled."[12]

The Court in *Complete Auto Transit* never intended to address taxes other than taxes that purport to attach to "doing business" within a given state; nor did it seek to develop a "test" to be applied to all tax cases relating to the Commerce Clause. This Court did not implicitly overrule *Helson*. It directly overruled *Spector*. It seems extremely unlikely, if not patently incorrect, to suggest that this Court indirectly or implicitly "superseded" a line of decisions relating to specific use taxes when it took considerable effort to *expressly* overrule a series of cases that involved an entirely different type of tax, namely a "doing business" tax. This Court is not so cavalier as to endeavor to provide better understanding of the parameters of the Commerce Clause and thereby create more confusion. The better reading of the *Complete Auto Transit* is that it does what it purports to do: It overturns the rule in the *Spector* case.

The more important language in *Complete Auto Transit* in the Association's view is this Court's identification that the *Spector* case distracted parties from asking the salient question: "Whether the tax produces a forbidden effect?"[13] The Association believes that Louisiana's tax on compressor fuel used by interstate pipelines is a direct burden on that interstate commerce. The forbidden effect is a burden on activity that cannot be separated from the interstate commerce itself, namely using fuel to permit the commerce to be conducted at all. Importantly, if this tax is permitted to remain in effect, nothing would prevent every state from attaching a compressor fuel tax of whatever magnitude it deemed appropriate. The movement of gas from off-shore Louisiana could conceivably be taxed by every state through which the interstate pipeline passed. The Association's members would pay ever increasing costs from this multiple taxation simply for using the interstate pipeline system ***in the manner that Congress and the FERC intended.*** That is a result the Association believes the Constitutional framers sought to avoid, the type of "forbidden effect" that this Court noted was the true issue in matters of this kind.

The Wisconsin Supreme Court concluded that this type of use tax was improper in a case involving essentially the same facts. In so doing, it correctly applied both *Helson* and *Complete Auto Transit*. Wisconsin correctly noted that this Court had not overturned its decision in *Helson* even after the enunciation of the four elements in *Complete Auto Transit*. In *Midwest Gas Transmission Co. v. Wisconsin Department of Revenue*[14] the Wisconsin Department of Revenue sought to tax

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[13]430 U.S. 274, 288.

[14]84 Wis. 2d 261, 267 N.W.2d 253 (1978).

the fuel used in two compressors of Midwest Gas Transmission. The Wisconsin Court reviewed the line of cases beginning with *Helson* and ending with *Complete Auto*. There the Court concluded:

> [T]he department seeks to impose a use tax on that amount of natural gas consumed in engines which provide the pressure necessary to propel the great bulk of the taxpayer's gas through interstate commerce. Although this activity takes place within the state, we are satisfied that this consumption is an *integral part of the process of interstate commerce* which does not have a substantial nexus with the state. Thus, it remains immune from state taxation by reason of the Commerce Clause. (emphasis added)[15]

The Supreme Court of Wisconsin correctly recognized that, even though the consumption was accomplished within the state and ostensibly created a nexus with the state, the consumption of fuel was so integral to the interstate commerce involved that taxing it would be a direct burden on interstate commerce contrary to the Commerce Clause.

That is fundamental to an understanding of both the *Helson* and *Complete Auto Transit* decisions. The tax in both *Helson* and *Complete Auto Transit* are burdens on interstate commerce. The tax in *Complete Auto Transit* is permissible because there is a sufficient nexus between the activity and the State to permit the tax. That is not the case in *Helson*. The consumption of fuel cannot be distinguished in any rational manner from the act of interstate commerce itself. Without the fuel the compressors cannot operate, the pipes lose pressure and the very act of moving gas cannot be accomplished.

[15]84 Wis. 2d 261, 270, 267 N.W. 2d 253, 258.

The structural changes mandated by Congress and implemented by the FERC make the result reached in *Helson* even more compelling. Congress has reshaped the natural gas market by deregulating the price paid for natural gas when it passed the Natural Gas Policy Act and the Wellhead Decontrol Act[16] and by creating the means for integrating the intra- and interstate pipeline networks.[17] The FERC carried out its obligations under the Congressional mandates of the Natural Gas Policy Act by adopting rules under Orders No. 436,[18] No. 500[19] and No. 636[20] thereby creating an open-access transportation environment that no longer differentiated between intra- and interstate transportation. This Court is largely familiar with these substantial and significant changes to the natural gas marketplace. However, a brief excerpt from the FERC's Order No. 436 is pertinent to the A.G.A.'s view of this proceeding:

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[16]The Natural Gas Policy Act of 1978, 15 U.S.C.. §§3301, *et seq.* (1982), The Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989) (*codified at various sections of 15 U.S.C. §§ 3301 (1982)*).

[17]*Id.*, §311, 15 U.S.C. §3371 (1982).

[18]*Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III FERC Stats. & Reg. [Reg. Preambles] ¶30,665 (1985), *vacated and remanded*, Associated Gas Distributors, v. FERC, 824 F.2d. 981 (D.C.Cir. 1987), *cert. denied*, 485 U.S.C 1006 (1988).

[19]*Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, III FERC Stats. & Reg. [Reg. Preambles] ¶30,761 (1987), *remanded*, *American Gas Association v. FERC*, 888 F.2d 136 (D.C.Cir. 1989), *readopted*, Order No. 500-H, III FERC Stats. & Reg. [Reg. Preambles] ¶30,867 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, III FERC Stats & Reg. [Reg. Preambles] ¶30,880 (1990), *aff'd in part and remanded in part, American Gas Association, v. FERC*, 912 F.2d 1496 (D.C.Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).

[20] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol*, III FERC Stats. & Regs. [Reg. Preambles] ¶30,939 (1992), (Order No. 636), *order on reh'g*, III FERC Stats. & Regs. [Reg. Preambles] ¶30,950 (1992) (Order No. 636-A) *order on reh'g*, 61 FERC ¶61,272 (1992) (Order No. 636-B).

These statutory changes reflect a Congressional determination that producers of natural gas do not have "natural" monopoly power. In other words, the statute reflects the workably competitive nature of the production industry.

Moreover, as a result of physical and technological changes that have taken place as the industry has grown and matured over the last fifty years, a given supply of the natural gas commodity can now be transported — by front haul, back haul, exchange or displacement — to points throughout the continental United States. As a result, as a technical matter, producers of natural gas can market their supplies in an essentially national market while individual customers or resellers of gas (such as the local gas utilities) can obtain supplies from a variety of sources.

These legal and technical changes have already begun to restructure the industry.

The Commission's overriding goal in this docket is to adapt our regulations to these fundamental legal and technical changes so that we may continue to fulfill our statutory mandates under the NGA and the NGPA. Thus, the final rule adjusts, within the scope of the authority delegated by the Congress, those aspects of our current regulations that now appear to hinder the development of competition in those areas where competition will better protect the public interest than will traditional public utility regulatory rules.[21]

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[21]III FERC Stats. & Reg. [Reg. Preambles] ¶30,665 at 31,470.

Congress deregulated gas prices and the FERC opened access to transportation services. Interstate pipelines, because they are the only means through which natural gas is transported in interstate commerce are the essential links between the buyers and sellers in that deregulated marketplace. Their function and the service provided through them are the essence of interstate commerce in natural gas. Louisiana's attempted tax on the use of compressor fuel must be viewed in that context. The fact that the pipes and compressors that form the interstate pipeline system do not themselves move about like the ferryboat in *Helson* does not change the fact that they are the instrumentalities through which the interstate commerce is conducted. Gas that is produced off-shore of Louisiana can be consumed in Washington, D.C. The only way for that to occur is for that gas to be transported through the interstate pipelines. The Association believes Louisiana's attempted tax is a direct burden on the instrumentalities employed in that interstate commerce. This Court should find that Louisiana's use tax is one that produces a "forbidden effect" under the Commerce clause and is the type of burden the drafters of the Commerce Clause sought to avoid.

II. LOUISIANA INCORRECTLY APPLIES THE TEST ESTABLISHED IN *COMPLETE AUTO TRANSIT*

Louisiana compounds its error of ignoring *Helson* by failing to correctly apply the test established in *Complete Auto Transit*. Louisiana's position is simply this: There is a nexus between Columbia and the state of Louisiana. Therefore, the use tax applied to the natural gas fuel may attach. Louisiana found:

> Columbia's gas production has a substantial nexus with the State of Louisiana. Columbia's pipeline and

> four compressor stations carry natural gas from offshore Louisiana to the state's borders. Columbia pays Louisiana taxes on its employees and activity in the state.[22]

Louisiana's error is that the tax applied here does not seek to tax those activities. Louisiana seeks to tax the use of fuel that moves natural gas in interstate commerce. Louisiana's attempt to tax the use of fuel by Columbia must be compared to the tax applied in *Complete Auto Transit* upon which Louisiana relied. At issue in *Complete Auto Transit* was a tax applied to the specific transactions that occurred within the state of Mississippi. As this Court noted:

> We are advised by the appellee that the tax has been applied only to commercial transactions in which a distinct service is performed and payment made for transportation from one point within the State to another point within the State.[23]

Louisiana seeks not to tax Columbia's gas production, the ownership of the compressor facilities, its payroll or any other of a myriad of other aspects of Columbia's business enterprise that might or could be subject to an appropriate tax because of its local nature.[24] In this respect, Louisiana misapprehends the nature of the test adopted by this Court in *Complete Auto Transit*. This Court did not find that all taxes imposed by the states are appropriate so long as there is some nexus between the state and the *enterprise* being taxed. What is of significance is that there is some nexus between the state and the *activity being taxed*, so long as that activity can be

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[22]653 So.2d 522, 524.

[23]430 U.S. 274, 276.

[24]A.G.A. takes no position on the propriety of any other taxes, but merely indicates that other events might be taxable which could arrive at a different result.

separated from interstate commerce. Louisiana ignores that distinction and blithely finds that since Columbia can be found doing business within the state, then the tax on the use of fuel is appropriate. The Association believes that such a result ignores the import of *Complete Auto Transit*. In *Complete Auto Transit*, this Court stated:

> We note again that *no claim is made that the activity is not sufficiently connected to the State to justify a tax*, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned. (emphasis added)[25]

The Court was never called upon to determine whether the tax sought to be applied was related to activities within the state of Mississippi. That is not the case here. Columbia rightfully challenges the imposition of a tax on the use of the fuel that provides the sole impetus for natural gas as it moves on its interstate journey. The Association believes that the correct view is that adopted by the Wisconsin Supreme Court. The Court there said:

> Although this activity takes place within the state, we are satisfied that this consumption is an integral part of the process of interstate commerce which does not have a substantial nexus with the state. Thus, it remains immune from state taxation by reason of the Commerce Clause.[26]

There is no nexus between the act of consuming the fuel and the state of Louisiana that is distinct from its character as interstate commerce. There is no doubt that the fuel was con-

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[25]Note 25, *Supra* at 287.

[26]84 Wis.2d 261, 270, 267 N.W.2d 253, 258.

sumed within the state and, therefore, some nexus with Louisiana exists. But that is not the deciding factor. The deciding factor is whether that nexus is distinct and separate from its interstate commerce. Fuel used in compressors by interstate pipelines is an interstate commercial use inseparable from the pipelines and compressors themselves.

The results reached in *Pledger v. Arkla, Inc.*,[27] *Questar Pipeline Co. v. Utah State Tax Commission*,[28] and *Tennessee Gas Pipeline Co. V. Marx*[29] that agree with Louisiana are also incorrect. The Court in *Questar Pipeline* goes beyond *Complete Auto Transit* and finds that the simple existence of the potential taxpayer within the state is sufficient nexus to establish the validity of the tax. The *Questar Pipeline* court finds:

> The language of *Complete Auto* focuses on the relationship of the taxed activity to the state. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 632 (1977) decided a few weeks after *Complete Auto*, emphasizes, however, that nexus can be determined by looking at more than just the taxed activity.[30]

This conclusion misapprehends this Court's determination in *National Geographic*. There this Court was asked to determine whether the National Geographic Society could be compelled to collect a tax *that had already been determined to be appropriate*. The only question was whether the Society was found sufficiently within the state of California to be compelled to collect the tax and remit it to the state. The validity of the tax itself was not at issue. This Court noted:

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[27]309 Ark. 10, 827 S.W.2d 126 (1992).

[28]817 P.2d 316 (Utah 1991).

[29]594 So.2d 615 (Miss. 1992).

[30]817 P.2d 316, 318.

> The out-of-state seller becomes liable for the tax only by failing or refusing to collect the tax from that resident consumer. Thus, the *sole* burden imposed upon the out-of-state seller by statutes like §§ 6203 and 6204 is the administrative one of collecting it. (emphasis added)[31]

It is clear that this Court was not addressing in *National Geographic* the fundamental question that is in issue in this case. Namely, whether the tax is, in the first instance, a valid burden on interstate commerce. The courts in *Questar Pipeline, Tennessee* and *Pledger* reached the wrong result because they failed to make this distinction. Some elements of the interstate journey of natural gas must take place within a state. Under a correct reading of this Court's prior decisions, that fact alone is insufficient to permit the imposition of the use tax involved in this case. The fuel used by the elements of interstate commerce, in this case compressors and pipes that form a portion of the national interstate pipeline network, is in and of itself a portion of that interstate commerce. It is not distinct from that commerce but rather integral to the very nature of interstate commerce. To find that the use of fuel in compressors by interstate pipelines is not an integral part of that interstate commerce is to ignore the realities of interstate commerce in natural gas. Even Louisiana recognized this reality:

> Columbia Gulf Transmission Company ... transports natural gas from offshore Louisiana to its affiliate in Kentucky through underground interstate pipelines. The gas loses pressure during the journey and is recompressed at four Louisiana compressor stations.

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[31]430 U.S. 551, 558.

> Some of the pipeline gas is diverted to the compressor stations, *where it powers the engines which boost the interstate gas pressure*. (emphasis added)[32]

The Association believes that the correct application of this Court's decisions will establish that the use tax in this case produces a "forbidden result" by subjecting interstate commerce to a direct burden. No interstate movement of natural gas can reasonably occur without fuel being used to make it occur. Allowing Louisiana to impose such a tax will permit every other state to impose similar taxes. Interstate Commerce should not be forced to face the specter of such multiple taxes applied to simply moving gas in interstate commerce.

CONCLUSION

The attempted tax by Louisiana is contrary to the Commerce Clause. This Court has expressly found that a tax on fuel used by an instrumentality of interstate commerce is no different than a tax directly on that instrumentality. The direct taxation by the states of instrumentalities in interstate commerce is a "forbidden effect" contrary to the Commerce Clause. Further, the application of this Court's decision in *Complete Auto Transit* by Louisiana is in error. Louisiana misapplies the test established by this Court by first assuming that it "supersedes" this Court's decision in *Helson*, and then by incorrectly applying the test to the facts of this case.

The national natural gas marketplace, as envisioned by both Congress and the FERC, cannot exist without natural gas moving through interstate pipelines. The compressors and the fuel that powers them, for all intents and purposes, are the only

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[32]653 So.2d 522, 533.

"instrumentalities" that carry on this interstate commerce. This Court should not permit Louisiana, nor any other state to impose the type of tax that is sought to be imposed here. The fuel used to drive the compressors that move the gas in interstate commerce is not distinguishable in any meaningful manner from the act of interstate commerce itself.

The Association and its members are engaged in various aspects of the natural gas marketplace and use and operate the interstate pipeline system, the only means by which the interstate commerce in natural gas can be conducted. The Commerce Clause is intended to preclude the several states from restricting the free flow and development of that commerce. The tax applied in this case and the cases of *Pledger*, *Questar Pipeline* and *Marx* are direct burdens on such interstate commerce, and anathema to Congress' and the FERC's efforts to create a national market. If allowed, these taxes will be born by the Association's members simply because many of them purchase natural gas that is transported in interstate commerce. This Court should grant certiorari in this proceeding to fully address what has been, and will likely continue to be, an area of continuing litigation as the states seek to extend their reach into this growing marketplace. The cases currently decided by several state courts leave the members of A.G.A. at a loss to discern whether the act of moving gas through the several states via the interstate system of pipes and compressors is likely to be burdened by additional taxes as the gas is transported from state to state. Granting certiorari and addressing the issues raised in this matter will be of substantial benefit to all of the elements of the national natural gas marketplace. The Association, on behalf of its

members, believes that this Court should grant Columbia's petition for writ of certiorari.

Respectfully submitted,

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